Office-Supreme Court, U.S.
FILED
MAY 8 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1506

In The

Supreme Court of the United States

October Term, 1984

AIRWORK SERVICE DIVISION,

Petitioner,

v.

DIRECTOR, DIVISION OF TAXATION,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION TO MOTIONS FOR LEAVE TO FILE BRIEFS AS AMICI CURIAE

IRWIN I. KIMMELMAN
Attorney General of New Jersey
Attorney for Respondent,
Director, Division of Taxation
Richard J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625
(609) 292-1527

JAMES J. CIANCIA
Assistant Attorney General
Of Counsel

HARRY HAUSHALTER
Deputy Attorney General
On the Brief

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF THE CASE 1

ARGUMENT:

The Motions By The Three Parties For Leave To File Briefs As *Amici Curiae* Should Be Denied Since The Substantive Due Process Issue Briefed By These Parties Was Not Properly Raised Before The New Jersey State Courts. 2

CONCLUSION 5

TABLE OF AUTHORITIES

CASES:

Bethlehem Bd. of Education v. Bethlehem Education Association, 177 *N.J. Super.* 479, 427 *A.*2d 80 (App. Div. 1981) 4

Cardinale v. Louisiana, 394 *U.S.* 437 (1969) 4

Endress v. Brookdale Community College, 144 *N.J. Super.* 109, 364 *A.*2d 1080 (App. Div. 1976) 4

Hill v. California, 401 *U.S.* 797 (1971) 5

In re Byram Tp. Bd. of Education, 152 *N.J. Super.* 12, 377 *A.*2d 745 (App. Div. 1977) 4

Moore v. Illinos, 408 *U.S.* 776 (1972) 5

STATUTES:

N.J.S.A. 54:32B-1 *et seq.* 1, 2

N.J.S.A. 54:32B-3 3

N.J.S.A. 54:32B-3(b) (2) 3

28 *U.S.C.* § 1257(3) 4

COUNTERSTATEMENT OF THE CASE

Airwork Service Division ("Airwork"), has filed a petition for a writ of *certiorari* to have this Court review a decision by the Supreme Court of New Jersey sustaining an assessment imposed under the New Jersey Sales and Use Tax, *N.J.S.A.* 54:32B-1 *et seq.,* by the respondent, New Jersey Director of the Division of Taxation ("Director"). Airwork maintains that the decision sustained an unpublished change in the Director's policy which was retroactively applied against Airwork in violation of the Due Process Clause of the Fourteenth Amendment. This issue was not addressed by the Supreme Court of New Jersey because it was never raised below by Airwork and was raised for the first time before the Supreme Court of New Jersey by an *amicus curiae,* the American Civil Liberties Union. Three parties, Consumer Bureau, the American Civil Liberties Union of New Jersey and the Chamber of Commerce of the United States of America, have filed separate motions with this Court for leave to file briefs as *amici curiae.* This brief is filed in opposition to such motions on the basis that these parties are raising an issue which is not subject to review by this Court since it was never properly raised before the New Jersey state courts.

Airwork is in the business of repairing plane engines for customers. Airwork conducted its repairing services solely in New Jersey for customers located throughout the country. At issue is the taxability of those receipts derived from repairing services performed on plane engines destined for delivery to out-of-state customers following the performance in New Jersey of the taxable services for the period August 12, 1971 to June 30,

1973. Airwork maintains before this Court as the sole basis for review that the assessment imposed against it was contrary to the official policy of the Division of Taxation as reflected in the Commerce Clearing House New Jersey State Tax publication ("CCH"), was changed in 1973 and was thus retroactively imposed upon services performed prior to the alleged change in policy. The three *amici* parties are supporting Airwork's contention that the assessment violated the Due Process Clause on the basis of the purported retroactive application of that policy. The Supreme Court of New Jersey, in a decision dated July 23, 1984 (97 *N.J.* 290, 478 *A.*2d 729 (1984)) (App. *1a), held that, as a matter of state law, the constitutional issue alleging a retroactive application of the sales tax in violation of the Due Process Clause was not properly before the Court since it was never raised by Airwork but rather was briefed for the first time by an *amicus* before the New Jersey Supreme Court.

ARGUMENT

The Motions By The Three Parties For Leave To File Briefs As Amici Curiae Should Be Denied Since The Substantive Due Process Issue Briefed By These Parties Was Not Properly Raised Before The New Jersey State Courts.

The New Jersey Sales and Use Tax, *N.J.S.A.* 54:32 B-1 *et seq.*, imposed a 5% levy for the assessment period

---

* The designations "Supp. App." and "App." refer to the supplementary appendix and appendix, respectively, filed by Airwork with this Court in conjunction with its petition for *certiorari*.

in question on the receipts derived from the sale of tangible personal property and the performance of designated services. *N.J.S.A.* 54:32B-3. The Legislature enumerated as taxable services the " . . . maintaining, servicing, repairing tangible personal property not held for sale in the regular course of business. . . ." *N.J.S.A.* 54:32B-3(b) (2). The applicable statute for the period in question made no distinction between taxable services performed on goods destined for out-of-state delivery or goods remaining in New Jersey and clearly taxed the servicing and repairing functions performed by Airwork in this State regardless of the eventual destination of the repaired aircraft engines.

Airwork maintains that it was a mere collector of the tax, that it properly relied on the information published in CCH in not collecting the tax and that the state is thereby prohibited from assessing an allegedly "retroactive" tax under the Due Process Clause. This issue of "unconstitutional unfairness" was never previously raised by Airwork and was raised for the first time before the Supreme Court of New Jersey by the American Civil Liberties Union, participating as an *amicus curiae.*

The New Jersey Supreme Court declined to address this issue, noting that this issue was raised by the American Civil Liberties Union, was not previously considered by the lower courts and was thus not being presented with a sound and complete record to demonstrate the viability of this allegation (Supp. App. 13a). It is well established as a matter of state law than an *amicus* is not a party to an action but merely seeks to advise and assist the court on an issue already part of the litigation. An *amicus* must thus accept the issues previously raised by

the parties and is precluded from injecting new issues not already considered. *Bethlehem Bd. of Education v. Bethlehem Education Association,* 177 *N.J. Super.* 479, 490, 427 *A.*2d 80 (App. Div. 1981); *In re Byram Tp. Bd. of Education,* 152 *N.J. Super.* 12, 18, 377 *A.*2d 745 (App. Div. 1977); *Endress v. Brookdale Community College,* 144 *N.J. Super.* 109, 123, 364 *A.*2d 1080 (App. Div. 1976). Therefore, since Airwork never raised this constitutional issue before any level of the New Jersey courts, the *amici* parties have no legal basis for briefing this issue before this Court.

This Court's jurisdiction to review this case arises under 28 *U.S.C.* § 1257(3), which concerns federal rights and privileges that have been "specially set up or claimed" and upon which there has been a final decision of the state's highest court. As noted, the claim by Airwork of a substantive due process violation was never raised by it in the state courts and is thus not a proper issue before this Court. As noted in *Cardinale v. Louisiana,* 394 *U.S.* 437, 439 (1969),

> Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, *O'Connor v. Ohio,* 385 *U.S.* 92, 17 *L.Ed.*2d 189, 87 *S.Ct.* 252 (1966), they should be given the first opportunity to consider them.

See also *Moore v. Illinois*, 408 *U.S.* 776, 799 (1972); *Hill v. California*, 401 *U.S.* 797, 805 (1971). Therefore, the federal constitutional issue raised in Airwork's petition should not be considered and thus it is clear that the three motions for leave to file briefs as *amici curiae* should be denied.

CONCLUSION

For the aforementioned reasons, it is respectfully submitted that the motions by Consumer Bureau, the American Civil Liberties Union of New Jersey and the Chamber of Commerce of the United States for leave to file briefs as *amici curiae* should be denied.

Respectfully submitted,

IRWIN I. KIMMELMAN
Attorney General of New Jersey
Attorney for Respondent,
Director, Division of Taxation

By: HARRY HAUSHALTER
Deputy Attorney General
Member of the Bar of the
United States Supreme Court

Dated: May 6, 1985

JAMES J. CIANCIA
Assistant Attorney General
Of Counsel

HARRY HAUSHALTER
Deputy Attorney General
On the Brief